

MINUTES OF MEETING OF THE CORPORATIONS COMMITTEE
April 7, 2006

A regular meeting of the Corporations Committee (the “Committee”) of the Business Law Section of the State Bar of California was held at the Renaissance Montura Hotel, Los Angeles on April 7, 2006. Attendance was as follows:

MEMBERS PRESENT:

Nelson D. Crandall*
Christopher A. Delfino
Bruce R. Deming
Matthew R. Gemello
Steven R. Harmon*
Victor Hsu
Brian A. Lebrecht
Stewart Laughlin McDowell
David M. Serepca
Lemoine Skinner, III
Suzanne L. Weakley
Brian M. Wong
Russell J. Wood
James J. Thompson

MEMBERS ABSENT:

Curt C. Barwick
Clint Davis
Nina L. Hong
Peter Heinecke
Michael A. Occhiolini
Deborah J. Ruosch
William R. Sawyers
Jennifer Lynn Sostrin
Steven B. Stokdyk
Bertha Cortes Willner

LIAISONS AND GUESTS PRESENT:

Keith Bishop, Executive Committee*
Brad Clark, Non-Profit Corporations Committee and Guest of Honor
Larry Doyle, State Bar of California, Office of Government Affairs*
Rosalind Tyson, Securities and Exchange Commission*
John Webber, NASD*

*Via telephone

These minutes summarize discussion primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda that are not described in these minutes.

I. ADMINISTRATIVE MATTERS

1. Opening Remarks and Announcements: The meeting was called to order by Co-Chair Gemello at 9:30 a.m. He thanked the members of the Committee in attendance and noted that a quorum was present.
2. Telephone Line Disruptions: Members attending Committee meetings by telephone conference are advised not to place their lines on hold at any time while connected to the conference line, because this often results in loud (and very disruptive) beeping sounds or music audible to all conference participants who are not on hold. If a member must leave the conference line, he or she should simply hang up and then dial back in later.
3. Approval of Minutes: The minutes for the March 2006 meeting were approved in the form circulated, with a clarifying revision to the SB 1207 discussion.

II. AGENCY AND LIAISONS' REPORTS

1. Securities and Exchange Commission: Rosalind Tyson reported that the SEC had released its small company reporting guidelines and briefly summarized the key elements of the guidelines.
2. National Association of Securities Dealers: John Webber reported on several recent announcements by the NASD.
3. Department of Corporations: No report was provided.
4. Secretary of State: No report was provided.
5. Corporate Law Departments: Steve Harmon reported that the Corporate Law Departments Committee remains very interested in coordinating with the Corporations Committee on upcoming teleseminars and other events of common interest. Steve will contact them regarding our teleseminar scheduled for Friday, May 26, 2006, at 12:30 p.m. on attorney-client privilege to seek permission to publicize the program to their constituents.
6. Non-Profit Corporations Committee: Brad Clark, who chairs the Non-Profit Corporations Committee, reported that it will be working on amendments to the Non-Profits Corporations Act.
7. Partnerships and LLCs Committee: Lemoine Skinner reported on the recent California case holding the gross receipts tax on LLCs unconstitutional because the tax is not apportioned to California, and on a recent release by the Franchise Tax Board that each separate series of a series LLC must file and pay a separate franchise tax.
8. Executive Committee: Keith Bishop reported on the March retreat of the Executive Committee and Standing Committee officers of the Business Law

Section. He noted that there was a focus on improving standing committee websites and distribution of information electronically to standing committee members and constituents.

III. SUBCOMMITTEE REPORTS

1. Legislation:

a. Jury Waivers: Chris Delfino reported on the status of the various legislative proposals addressing the 2005 California Supreme Court decision, *Grafton Partners, L.P. v. Superior Court*, and the enforceability of contractual pre-trial jury waivers. Because it is likely that the State Bar Board of Governors would reject the ALP proposed by the Business Law Section, Chris recommended that the Committee instead prepare a letter in support of AB 2767, which is substantially similar to the Business Law Section's ALP. A support letter would not require approval of the Board of Governors. The Committee delegated authority to the Legislation Subcommittee to prepare a support letter.

b. AB 2426: Chris Delfino reported that this bill would apply to all publicly traded corporations and would require disclosure of the compensation paid to all executive officers. It was agreed that the Corporations Committee should prepare a comment letter opposing this legislation. Steve Harmon and Bruce Deming volunteered to draft a comment letter on an expedited basis and seek Executive Committee approval before the April 17, 2006 hearing.

c. Corporate Disclosure Act: Bruce Deming reported on the status of the ALP to amend the Corporate Disclosure Act, which he expects to submit to the Legislative Subcommittee of the Executive Committee for final approval in the coming weeks.

d. Extranet Folder for Pending Legislation: Chris Delfino circulated a chart of pending legislation of potential interest to the Committee. He will set up a special folder for pending legislation at the Fulbright & Jaworski extranet, and post the chart as well as copies of the actual bills in that folder.

2. Communications/Website: Suzanne Weakley reported on several developments announced at the March leadership retreat:

a. Standing Committee Online Workrooms: The State Bar is building online private "Committee Workrooms" for each committee at the State Bar website, which will function like the Fulbright & Jaworski extranet, but with additional features, such as a blogging space, archive capabilities, etc. These are expected to be available by 2007. Once the Workrooms are operational, the Committee should terminate the F&J extranet and move all material over to the official State Bar Workroom for the Corporations Committee.

b. Committee Website Development: The Insolvency Committee's website was highlighted at the retreat as an example of the direction that standing committees should take with their own websites. Retreat participants were also given a copy of a document titled "Standing Committee Websites - Best Practices" to assist in development of committee websites.

c. New Web Coordinator: Dan Appleman, a member of the Executive Committee, has been designated as the person to handle all requests from standing committees for postings on the State Bar website, instead of Michael Mullen. From now on, David Serepca and Jennifer Sostrin should direct all such requests to Dan.

d. Surveys: The State Bar now has an electronic survey capability, so if the Committee ever wishes to survey its constituency, this alternative should be considered.

3. Education/Publications:

a. Teleseminars. Suzanne Weakley reported that the February teleseminar on shareholder voting, presented by Keith Bishop, was a great success. The next Corporations Committee teleseminar will be on Friday, May 26, 2006, at 12:30 p.m. (90 minutes in length). The title is "*The Changing Landscape of Attorney-Client Privilege for Corporations*," and the speakers will be Russell J. Wood, Corporate Counsel, Agilent Technologies, Inc., Palo Alto, and Steven K. Hazen, Partner, Davis Wright Tremaine LLP, Los Angeles. A third teleseminar (to be scheduled) on SEC Investigations, has been proposed by Ed Gartenberg, Vice Chair of the Partnerships and LLCs Committee, for co-sponsorship by the Corporations Committee. The speakers would address the topic from the point of view of advising a client who is faced with the problem, including SEC process and procedure, Wells notices, asset freezes, criminal aspects, and appropriate responses. Matt Gemello and Steve Stokdyk will follow up with Ed Garterberg in this regard.

b. Handbook for Incorporating a Business in California. Carol Lucas informed Suzanne Weakley that the Executive Committee has forming a subcommittee to review and comment on the Handbook. The subcommittee will furnish the Corporations Committee a marked-up copy of the PDF of the Handbook and a separate memo with commentary. Ms. Lucas expects that this process will take at least two to three months.

c. Articles. Suzanne Weakley reported that Clint Davis' article on 2005 Corporate Law Developments has been edited by the BLN and should appear in the April issue. In addition, Suzanne will obtain a CD of Keith Bishop's teleseminar on shareholder voting, have it transcribed, and contact the BLN to determining whether they are interested in editing the transcript to produce an article on the same topic for publication.

- d. State Bar Annual Meeting Program. Suzanne Weakley announced that the Executive Committee has selected the Corporations Committee's proposed program, *Recent Corporate Law Developments*, for presentation at the annual meeting in Monterey in October, 2006. The speakers will be Lemoine Skinner and Steve Harmon. This was the only Committee program proposal selected.
 - e. Bruce Dravis Project: ABA Book on Independent Directors and Corporate Governance. Stewart McDowell reported that Bruce Dravis may still be seeking authors for one or more chapters of this proposed new ABA book. She will circulate copies of the chapter outlines to Committee members.
4. Litigation. Russ Wood reported on recent case law of interest to Committee members.

IV. ONGOING PROJECTS

1. SB 1207: SB 1207 is the so-called majority vote provision, that would require directors who do not receive a majority vote in uncontested elections to resign. The concept is to allow shareholders to vote against a director even if no one is running against that director. Stewart McDowell has prepared a draft statement of position for the Committee, including two possible alternative positions: either to oppose SB 1207 entirely, or to try to suggest amendments. The Chamber of Commerce flatly opposes the bill. Keith Bishop pointed out that (i) the bill doesn't distinguish between actual shareholder ballots and proxy cards; that there is no such thing as a "withheld vote;" (ii) there is a risk that all directors would have to resign if the board terms are not staggered and there is a failed election; (iii) the existing director removal statutes include significant protections for shareholder. It was agreed that the position statement should point out there are technical flaws with the bill and the bill would end-run many existing shareholder protections. It is likely that the bill will be heard by the Judiciary Committee around the beginning of May. After discussion, the Committee unanimously voted (x) to oppose the bill, but to include commentary making conceptual suggestions regarding the elements that should be addressed in order for the proposed law to work in California, and (y) authorize the drafting committee comprised of Ms. McDowell and Messrs. Wong and Harmon, with assistance from the Co-Chairs, to finalize the formal opposition paper and submit it to the Executive Committee to commence the requisite approval process.
2. Section 307(b) Project: David Serepca reported that, based on comments received from the Committee, Hugh Friedman revised his commentary on Section 307(b) to be published in the next update of the Rutter Group corporations treatise. The revision was posted on the F&J extranet just before the March meeting. This issue has now been resolved.
3. Section 2115 Project: Bruce Deming has prepared a memorandum on quasi-California corporations, including a comparison of California and Delaware law. Bruce reported there are several different legislative approaches possible for

amending Section 2115 following the *VantagePoint* and *Grosset* decisions., including (i) doing nothing, (ii) repealing Section 2115 altogether, (iii) defining and limiting what companies are subject to Section 2115, and (iv) changing the substance of Section 2115 to keep the elements that are significantly different in California (such as cumulative voting, shareholder distributions, controlled mergers and director removal), and eliminate the elements that are least significant or only slightly different than Delaware. Bruce will arrange to post the chart on the F&J extranet, and the issue will be discussed further at the May meeting. David Serepca noted that other states besides Delaware, such as Nevada, may be implicated.

4. National Venture Capital Association Model Forms Project: Lemoine Skinner reported on the status of the National Venture Capital Association Model Forms project. Wilson Sonsini has completed its review of the forms and prepared a memo advising that major changes to the forms are necessary. Mr. Skinner will post a copy of the Wilson Sonsini memo on the F&J extranet.
5. Close Corporation Project: David Serepca reported on the status of the draft Close Corporation law, which is proposed to become a new Chapter 20A to the General Corporation Law. The project also involves related amendments to other chapters of the GCL, as well as preparation of the accompanying ALP. The subcommittee's work product to date has been reviewed by (i) Mel Eisenberg of the University of California, Boalt Hall School of Law; (ii) Hugh Friedman of the University of San Diego School of Law; (iii) Jim Fotenos of Greene, Radovsky, Maloney & Share LLP (and former Co-Chair of the Committee); and (iv) Brad Clark of O'Melveny & Myers, who is the current editor of the multi-volume Ballentine & Sterling California corporation law treatise. There are some open issues, including director weighted voting, the enforceability of shareholder agreements in nonstatutory close corporations, and the meaning of "equity of the corporation." The subcommittee hopes to have a draft ALP ready by June or July, 2006.
6. ABA Task Force on Attorney-Client Privilege: Russ Wood reported that the F&J extranet now includes a folder of attorney-client privilege materials. He further reported that the U.S. Sentencing Commission has recently agreed to remove waiver of the privilege from its list of factors to be considered by the federal judiciary in the sentencing phase of actions against corporations, although other problems (such as the Thompson memo) remain. He also reported on the new proposal to create a federal statutory attorney-client privilege, that would include provisions for selective waiver, to be incorporated in the Federal Rules of Evidence. This proposal raises some perplexing federal-state preemption issues. Moreover, the ABA is opposed to the selective waiver concept. After discussion, the Committee unanimously voted (x) to formally submit an opposition paper to the proposed Rule 502 to the Federal Rules of Evidence, and (y) authorize the drafting committee comprised of Messrs. Wood, Gemello and Stokdyk to finalize the formal opposition paper and submit it to the Executive Committee to commence the requisite approval process.

7. Venture Capital Opinion Project: Matthew Gemello reported that the Opinion Committee is soliciting a volunteer from the Corporations Committee to assist in producing a form of legal opinion, based on the two recent BLS opinion reports, for use in venture capital transactions. Any Committee member who is interested should notify Matthew.

V. NEW BUSINESS

There was no new business not otherwise discussed in context above.

The meeting was adjourned at approximately 12:40 p.m.

Suzanne L. Weakley and Matthew R. Gemello,
Acting Co-Secretaries